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Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

BOMBARDIER INC., BOMBARDIER RECREATIONAL PRODUCTS INC. AND BRP US INC.,
Petitioners,

v.

DOW CHEMICAL CANADA ULC; CARLOS ORLANDO FANDINO, CLAUDIA CASTILLO, DANIEL CASTILLO, JONATHAN CASTILLO, CARLOS RAFAEL FANDINO, KAYLIE FANDINO, ALEXIS MERCADO, ERIKA MERCADO, LIZANDRO MERCADO, SANDRA MERCADO; DAN FITZGERALD'S JET WORLD, INC.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a products liability personal injury case arising out of an explosion of a personal watercraft on navigable waters, do 28 U.S.C. § 1331 and previous decisions of this Court require a state court judge to apply Federal Maritime Law on those claims for relief where conflicting standards govern liability between State law and Federal Maritime Law?

PARTIES TO THE PROCEEDING

Rule 14.1(b) Statement: The following lists all parties to the proceeding in the court whose judgment is sought to be reviewed:

Petitioner: Bombardier Inc., Bombardier Recreational Products Inc., and BRP US Inc. (collectively "Bombardier")

Real Parties in Interest: Dow Chemical Canada ULC; Carlos Orlando Fandino, Claudia Castillo, Daniel Castillo, Jonathan Castillo, Carlos Rafael Fandino, Kaylie Fandino, Alexis Mercado, Erika Mercado, Lizandro Mercado, Sandra Mercado; Dan Fitzgerald's Jet World, Inc.

Rule 29.6 Statement: Bombardier Inc. is Publicly Traded on Toronto Stock Exchange (BBD.A; BBD.B.); Bombardier Recreational Products, Inc. and BRP US Inc. are owned as follows: Bain Capital 50%; Bombardier Family 35%; Caisse de Depot & Placements du Quebec 15%.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bombardier Inc., Bombardier Recreational Products Inc. and BRP US Inc. (collectively "Bombardier") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division One, in this case.

ORDERS BELOW

The order of the Superior Court of California for the County of Los Angeles denying Bombardier's motion to apply admiralty law to the action, appears at Appendix C and is unpublished. *Fandino v. Bombardier Inc.* No. BC413322 (Cal. Super Ct., L.A. County, Sept. 15, 2010; See App. C at 5a-8a, infra.

The order of the California Court of Appeal denying Bombardier's petition for writ of mandate (challenging the Superior Court's order), appears at Appendix A and is unpublished. *Bombardier Inc. v. Superior Court,* No. B227857 (Cal. Ct. App. December 16, 2010); see App. A at 1a-2a, infra.

The order of the California Supreme Court, denying Bombardier's petition for discretionary review, appears at Appendix B and is unpublished. *Bombardier Inc. v. Superior Court*, No. S189322 (Cal. Sup. Ct. February 16, 2011); See App. B at 3a, infra.

STATEMENT OF JURISDICTION

The judgment of the California Court of Appeal, summarily denying Petitioner's petition for writ of mandate on the federal question, was entered on

December 16, 2010. The order of the California Supreme Court, denying Petitioner's petition for discretionary review, was entered on February 16, 2011. This petition is being timely filed by April 6, 2011. See Sup.Ct.R. 13.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). While Petitioner's motion to apply maritime law to the trial of this case is literally not final, Petitioner respectfully contends that the California Superior Court's order denying the application of maritime law is, for all intents and purposes, final. Petitioner is cognizant that under 28 U.S.C. § 1257, this Court's jurisdiction is limited to review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." However, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 489, 43 L.Ed 2d 328, 95 S.Ct. 1029 (1975) ("Cox"), this Court described four categories of cases to be regarded as "final" on the federal issue despite the ordering of further proceedings in the lower state courts.

The present case comes closest to fitting the third *Cox* category. That category involves "those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, supra at p. 481. While the federal claim raised here can technically be reviewed subsequent to the trial, as a practical matter it will likely completely evade review no matter the ultimate outcome of the case. That is due, in substantial part, on the standards of appellate review in California following

jury trial, as well as the practical realities facing the losing party.

If Petitioner prevails, it will have no right to press an appeal on the federal issue, as the incorrect choice of law application will not have aggrieved it. In California, as in most jurisdictions, a victorious party has no standing to appeal. The defeated plaintiffs may choose not to appeal, either because there are no valid grounds upon which to base an appeal or because of other practical reasons making an appeal unattractive, such as costs of the appeal and retrial with a second doubtful or uncertain outcome, even if they successfully were able to obtain a retrial. If Plaintiffs do appeal, even a cross-appeal by Petitioner on the federal issue may not be reached by the California Court of Appeal or Supreme Court, as a determination on the federal issue would be unnecessary should the Plaintiffs fail to raise a viable appealable issue that necessitates review of any issues, federal or otherwise, raised by Petitioner's anticipated cross-appeal.

If on the other hand, Plaintiffs prevail, Petitioner may choose not to appeal, based upon a cost-benefit analysis undertaken by its principals. Further, even if Petitioner would appeal, the federal issue may not necessarily be decided, if Petitioner cannot establish from a review of the entire record that it was probable that the jury would have provided a result in its favor had the correct choice-of-law been applied, which is the burden in California for error attributed to choice-of-law.

In other words, the fact that the federal issue may likely be final at this stage, even if it is not literally final, strongly militates in favor of review. When

added to the fact that this Court may decide to grant Dow Chemical Canada ULC's ("Dow") Petition for Writ of Certiorari on a question of personal jurisdiction, in this case, *Dow Chemical Canada ULC v. Fandino*, Docket No. 10-250, the case for immediate review of the federal issue is more compelling. Dow's petition has been pending since August 18, 2010 and was the subject of distribution for the Conference of January 14, 2011. Considerations of judicial economy are relevant to the precise procedural posture at bench.

RELEVANT STATUTE

Section 1333(1) of Title 28 provides.

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

This is a personal injury case filed by Carlos O. Fandino and others, seeking to recover for personal injuries incurred as a result of an explosion of a Sea-Doo GSX® personal watercraft on which Mr. Fandino was sitting twenty yards off the shoreline of Lake Havasu in California. The plaintiffs sued Bombardier on May 7, 2009, among other defendants, for strict products liability, negligence-product liability, and negligent infliction of emotional distress, in addition to other claims for relief.

The dispute now presented for this Court arose when Petitioner filed its motion for an order applying substantive admiralty law to the trial of this case. Bombardier asserted that the facts of this case fully met the requirements for application of substantive admiralty law.

Petitioner established and the trial court ultimately agreed that Lake Havasu was a navigable water way under the law, that the use of personal water craft (PWCs) is traditionally associated with maritime activity, and that the plaintiffs' exploding vessel accident had the potential to disrupt maritime commerce.

Petitioner next presented authorities, including longstanding decisions of this Court, which stand for the rule that where admiralty jurisdiction exists, courts should apply federal maritime law it in order to achieve uniformity. Petitioner pointed out that decisional law holds that the choice of substantive law required to be applied is not to be determined by whether the case was tried in federal or state courts, i.e., that the existence of concurrent jurisdiction of state and federal courts does not permit a plaintiff to choose the substantive law to be applied.

Plaintiffs argued that even if admiralty jurisdiction existed, the court need not apply admiralty law and that there was no conflict between plaintiffs' elected state law remedies and those afforded by admiralty law. However, Plaintiffs conceded that the trial court would have to apply federal maritime law where federal maritime law and state law conflicted.

In reply, Petitioner emphasized that while the saving's clause, 28 U.S.C. § 1331, allows plaintiffs to choose a forum, it does not give them the power to determine what substantive law should be applied to their case. Petitioner pointed to critical differences between California state law and federal admiralty law, which included material differences in the treatment of (1) the strict products liability-designed defect tests; and (2) the standards for applying the cause of action for negligent emotional distress.

At the hearing on the motion, the trial court answered the threshold question regarding the applicability of admiralty law, -- expressly finding that each of the three requirements for the existence of admiralty law jurisdiction was present in this case. Echoing plaintiffs' opposition, however, the Superior Court expressed concern that applying admiralty law would deprive plaintiffs of a jury trial.

Bombardier emphasized that while the remedies existing under state law also exist under admiralty law, the legal standards to be applied are different. It emphasized that while plaintiffs will have the choice of the forum under the "savings of suitor" clause, to also grant plaintiffs the choice of law to be applied would defeat the entire purpose of the Admiralty law statutes and the strong policy in favor of uniformity recited by this Court and the California Supreme Court.

The trial court expressed its belief that the plaintiffs could choose whether to proceed under Maritime law or state law, but it took the matter under submission.

On September 15, 2010, the trial court issued its Order denying Petitioner's motion. While it expressly rejected Plaintiffs' arguments that the requirements for Admiralty jurisdiction to apply were not met, it nonetheless denied Petitioner's motion.

The trial court based it denial upon its interpretation of the "savings to suitors" clause of 28 U.S.C. § 1333 that whether a state court has concurrent jurisdiction over a maritime case, Plaintiff has the right to choose whether he or she wants Admiralty or State law to apply to the case.

REASONS FOR GRANTING THE PETITION

I. The California State Court Has Wrongly Decided the Choice of Law in an Admiralty Case in Conflict with Previous Decisions of this Court and the Policies Supporting Them

It has long been a rule of law in Admiralty cases that "[W]ith admiralty jurisdiction comes the application of substantive admiralty law." *East River S.S. Corp. v. Transamerica Delavar Inc.* 476 U.S. 858, 864 (1986) ("East River"). Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules, including product liability concepts. *East River*, supra, 476 U.S. at p. 864.

The primary focus of admiralty jurisdiction is the protection of maritime commerce, which requires a uniform system of rules to govern conduct and liability on all navigable waterways. *Foremost Ins. Co. v.*

Richardson 476 U.S. 668, 674-675 (1982) ("Foremost"). The purpose of admiralty law is to provide a system of law "coextensive with, and operating uniformly in, the whole country." *Moragne v. States Marine Lines, Inc.* 398 U.S. 375, 402 (1970) ("Moragne").

State courts have concurrent jurisdiction with federal courts to entertain and try actions pleaded pursuant to the *Jones Act* and the general maritime law. Federal jurisdiction is derived from Article III, Section 2 of the United States Constitution, which confers that jurisdiction on "United States Court" over "all cases of admiralty and maritime jurisdiction."

Section 1333 of Title 28 of the *United States Code* provides for exclusive federal jurisdiction in admiralty cases with the exception of "saving to suitors in all cases all other remedies to which they are otherwise entitled." The exception allows litigants to pursue certain limited recoveries in a state court. (See *Engel v. Davenport* 271 U.S. 33 (1926) ("Engel").

The prevailing rule is that, regardless of the forum, federal substantive law applies. Numerous United States Supreme Court cases have discussed this principle – e.g., *Engel,* supra; *Garrett v. Moore-McCormack Co.* 317 U.S. 239 (1942); *Pope & Talbot, Inc. v. Hawn* 346 U.S. 406 (1983); *Kermarec v. Compagnies Generale* 358 U.S. 625 (1959). The rationale is the perceived need for uniformity in maritime tort law, regardless of place of injury or forum of trial. In addition, it has been of historical importance to fashion and apply federal law liberally. The federal cast of admiralty law means the "state law must yield to the needs of a uniform federal maritime law" when the court "finds inroads on a harmonious

system. *Yamaha Motor Corporation, U.S.A. v. Calhoun* 516 U.S. 199, 211 (1995).

The rule has its roots in the federal Constitution's Supremacy Clause. The California Supreme Court in *Donaldson v. National Martine, Inc.* 35 Cal.4th 503, 510 (2005), stated, "A more recent high court case, *Howlett v. Rose* 496 U.S. 356, 369-370 (1990), confirmed that generally when a statute confers concurrent jurisdiction over a federal right of action, federal law becomes enforceable in state courts regardless of contrary state policy. This follows because the federal Constitution's Supremacy Clause makes that law "the Supreme Law of the Land" and is binding on the citizens and courts as state laws. (Id at p. 367.) As a consequence, the high court explained, a state having jurisdiction over the parties may not refuse to enforce a federal right in the absence of a valid excuse consistent with federal law. (Id. at pp. 369-372)."

In the area of maritime torts, the task of state courts has been that of ascertaining and applying appropriate legal principles derived from the considerable body of federal maritime law that has developed in the United States. Neither the United States Supreme Court nor any California authority provide a plaintiff with the right to dictate to a state court that it must apply state law instead of admiralty law. There is no such rule, as it would directly contradict the rule that is universally applied—that where applicable, federal maritime law must be applied by state courts when presiding over admiralty cases.

In pronouncing the rule that state law cannot be applied in a maritime cause if it would substantially impair a right arising under federal maritime law, this Court in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 345 (1942) declared: "The source of the governing law applied is in the national, not the state, governments. If by its practice, the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure ... admiralty courts, when invoked to protect rights provided in state law, endeavor to determine the issues in accordance with the substantive law of the state. So here, in trying this case, the state court was barred to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected."

The court in *Kunkel v. Motor Sports*, 349 F. Supp. 2d 198, 207 (D.P.R. 2004) ("*Kunkel*") acknowledged that the exercise of admiralty jurisdiction does not automatically displace state law, because federal maritime law may be supplemented by state law "in very discrete and exceptional procedural or remedial circumstances." However, it correctly applied federal maritime law to grant summary judgment to a defendant against the plaintiff's cause of action for negligent infliction of emotional distress, holding that because negligent infliction of emotional distress is a cognizable claim under admiralty, general admiralty law governs liability. See *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994) Because the standards governing liability for negligent infliction of emotional distress under general admiralty law

requires a plaintiff to either: (1) sustain "physical injury or impact:" (2) be in the "zone of danger;" or (3) be a bystander in proximity to the harm, the court granted defendant's motion because plaintiff was not present at the scene of the accident. *Kunkel*, *supra*, 349 F. Supp. 2d at p. 207.

The standards under California state law and those under federal maritime law for products liability are also in conflict.

California law provides that a product may be defective in its design under either of two alternative tests, commonly known as the "consumer expectation" test and "risk-benefit" test. *Barker v. Lull Engineering Co., Inc.* (1978) 20 Cal.3d 413, 432 ("*Barker*"); *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 563-564 ("*Soule*"). Under the consumer expectation test, a product is defective in design if it failed to perform as safely as an ordinary consumer would expect (or have a right to expect) when using the product in an intended or reasonably foreseeable manner. *Barker*, *supra*, 20 Cal.3d at pp. 429-430. Under the risk-benefit test, a design defect may exist because, in light of relevant factors, judged by hindsight, the risk of danger inherent in the challenged design outweighs the benefit of the deisgn. *Baker, supra,* 20 Cal.3d at p. 430; *Soule, supra*, 8 Cal.4th at p. 562. When proceeding on a risk-benefit theory, once the plaintiff makes a *prima facie* case of causation, the burden shifts to the defendant to establish that the benefits of its product outweighed the design risks. *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 121. The plaintiff need not go on to demonstrate feasible alternative designs. *Baker, supra*, 20 Cal.3d at p. 431.

In contrast, admiralty law applies the standard set forth in the *Restatement (2d) of Torts* § 402A ("*Restatement*"), as it represents "the best and most widely-accepted expression of the theory of strict products liability." *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.* 565 F.2d 1129, 1135 (9th Cir. 1977). The *Restatement* provides, in pertinent part, that:

> "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the Seller is engaged in the business of selling such a product; and (b) it is expected to and does reach the consumer without substantial change in the condition in which it was sold."

The test for strict product liability are therefore different as between California and section 402A. Of particular note is that there is no risk-benefit test under 402A, and the burden does not shift from the plaintiff to the defendant. Simply put, section 402A requires a plaintiff to prove the element that the product was "unreasonably dangerous," whereas California law under the risk-benefit theory does not.

While the "Saving to Suitors" Clause of 28 U.S.C. § 1333 provides concurrent jurisdiction in state court and allows for some state law causes of action to apply, federal maritime law takes precedence for those causes of action where federal maritime law and state law conflict. The "saving to suitors" clause is found in 28 U.S.C. § 1333(1).

This Court has clearly held that the savings clause "leaves state courts 'competent' to adjudicate maritime causes of action in proceedings in personam," however the state court must preserve the substantive admiralty rights of the litigants by applying federal law as it would be applied in federal court, when adjudicating claims for which state and federal courts have concurrent jurisdiction See e.g., *Scott v. Eastern Airlines* 399 F.2d 14 (3d Cir. 1968).

In erroneously ruling that Plaintiffs have the right to choose whether they prefer to have admiralty or state law apply to its causes of action at trial, the trial court apparently relied upon the cases of *In re Lockheed* 503 F.3d 351, 354 (4th Cir. 2007) ("*Lockeed*"), *In re Chimenti* 79 F.3d 534, 537 (6th Cir. 1996) ("*Chimenti*"), and *Ghotra v. Bandila* 113 F.3d 1050, 1054-1055 (9th Cir. 1998) ("*Ghotra*"). The trial court quoted extensively from the decisions, but ultimately discerned a holding and rule for which those cases do not stand. There simply is no rule recited therein, or anywhere else, that permits a plaintiff to choose whether to have the state court apply maritime law of state law to a maritime case tried in state court.

There was nothing remarkable in the portions of *Lockheed, Chimenti* and *Ghotra* quoted by the trial court – they merely described the ability of a plaintiff to select a state court forum ----it expresses no rule permitting that plaintiff also to dictate what substantive law must be applied to the case.

There is literally no case that stands for a rule that permits a plaintiff to dictate the choice of substantive law in his or her in personam admiralty case. In contrast, there are myriad cases of this Court that hold

just the opposite, i.e., that the state trial court is bound to apply admiralty law to such disputes. The uncontroversial fact that a plaintiff has the right to choose the forum for trial does not alter that result to any degree. As argued by Petitioners before the trial court, if the rule were otherwise, the entire policy of promoting uniformity in the disposition of admiralty cases would be nullified, as would the valid and long-standing opinions of this Court.

II. The Issue of Whether to Apply Maritime of State Choice of Law Is of Exceptional Importance

The importance of providing greater clarity in this area is indicated in several ways. As personal watercraft usage have increased greatly over the past few decades and, a greater number of the accidents has arisen from their use, along with a great multitude of lawsuits. By 1996, the National Transportation Safety Board ("NTSB") estimated that there were nearly 12,100,000 state-registered recreational vessels alone, not including the countless Americans on the seas on charter and cruse vessels, white-water rafting trips, jet-boat excursions and casino boat gambling trips. *National Transp. Safety Bd., Safety Study Ntsb/Sh-98/01, Personal Watercraft Safety.*

Although Petitioner respectfully contends that the rules to be applied at bench are readily discernable from prior decisions of this Court, confusion as to the correct application of choice of law principles in maritime cases is seen from the decision of the California Superior Court and Plaintiffs, and has been as expressed by some legal commentators in recent years.

The initial foundation for the development of general maritime law, and this Court's "federalism jurisprudence" in this field, required the development of a uniform law. This viewpoint was clearly announced in the landmark case *Southern Pacific Railroad Co. v. Jensen* 244 U.S. 205 (1917) ("Jensen"), which held that the application of a New York Workmen's Compensation statute was unconstitutional because it "worked material prejudice to the characteristic features of general maritime law or interfered with the proper harmony of that law in its international and interstate relations.

Over the decades following *Jensen*, the general rule evolved that application of federal common law is not required in all admiralty-related cases. Rather, state law is intended to yield to general maritime law only when a court finds that the application of state law would make "inroads on [the] harmonious system" of maritime law needed for such things as the regulation of maritime commence. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959).

In 1996, this Court unanimously decided the case of *Yamaha v. Calhoun,* 516 U.S. 199 (1996). The *Calhoun* case arose from an accident where, Natalie Calhoun, a twelve-year-old resident of Pennsylvania, died in Puerto Rico when the jet ski her parents rented for her collided with another vessel. Natalie's parents sued the manufacturer of the jet ski, Yamaha Motor Corporation, claiming that a defect in the product's steering and throttle mechanism, the lack of sufficient warnings, and lack of collision protection, all were the contributing factors in the death of their daughter.

Justice Ginsburg, writing for the unanimous Court, determined that the case involve[d] a watercraft collision on navigable waters," and, as such, fell with "admiralty's domain." *Calhoun,* supra, 516 U.S. at p. 216.

However, this Court "reserved for another day" the issue that is involved at bench, whether the general maritime law or state law was the source of the standards governing liability. 516 U.S. at p. 216. This Court noted that this question appeared to require the reconciliation of maritime personal injury decisions in which state law had not been applied and maritime wrongful-death decisions in which it had. This Court stated: "We thus reserve for another day reconciliation of the maritime personal injury decisions that rejected substantive liability standards, and the maritime wrongful-death cases in which state law has held sway." *Id.*

Thus, the legal question posed to lower courts remaining after *Calhoun* is what law provides the rules of conduct and/or the standards governing liability, in cases involving the personal injury or death of a non-seafarer, including, but not limited to, a personal injury in or by a recreational boat?

Some legal commentators expressed the concern that *Calhoun*, taken at face value, could mean that there should be one set of rules for seafarers and another set of rules for non-seafarers, finding that a discrepancy in the case law between damages recoverable in seaman cases and damages recoverable in *Calhoun*-type recreational boater cases. See e.g., *Niels F. Johnson, Symposium: Federalism and Uniformity in Maritime Law: Post-Calhoun Remedies*

for Death and Injury in Maritime Cases: Uniformity, Whether Geest Thou?, 21 Tul.Mar.L.J.7, 40 (1996).

Other commentators suggested that this Court, in contrast with its approach to the issue of admiralty jurisdiction, had not formulated a comprehensive rule, or a discrete set of rules, to resolve choice-of-law disputes in admiralty cases. *James W. Bartlett, III, Admiralty Law Institute Symposium: A Sea Chest for Sea Lawyers: Recreational Boats: The Evaluation of Jurisdiction and Choice-of-Law Issues from the Constitution Through the Calhoun Decisions,* 75 Tul.L.Rev. 1247 (June 2001) Mr. Bartlett expressed frustration in attempting to organize the various approaches used by the Court in the hope of distilling some common elements of finding some overarching theme. He noted this vacuum in the law had been acknowledged by this Court in *American Dredging Co. v. Miller*, 510 U.S. 443, 452, "It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernable in our admiralty jurisprudence or indeed is even entirely consistent within our admiralty jurisprudence."

III. Further Delay Would Not Serve Any Interest

There is wisdom in allowing certain legal issues a period of time to percolate in the state courts and lower federal courts before presentation to the United States Supreme Court for ultimate resolution. This allows time to increase the number of judicial opinions and professional and academic commentary for this Court to consider, so as to be fully informed as possible before setting the precedent that will thereafter govern.

However, further delay of consideration of this issue would serve no public or private interest. In this regard, this Court is already considering whether to grant the Petition for Certiorari of Dow Chemical Canada ULC in this case, posing the question regarding the exercise of personal jurisdiction over a foreign component part manufacturer whose product had been incorporated into a finished product knowingly marketed extensively in the forum State for many years. As of this date of the filing of this Petition, there has been no determination whether Certiorari shall be granted or denied.

If certiorari is granted on Dow's Petition, that would serve as another reason for granting certiorari over the vital question raised in this petition, without awaiting the completion of the trial and inevitable appeals thereafter.

IV. This Case Is an Excellent Vehicle to Decide the Question of Choice-of-Law in an Admiralty Case Where State Law and Federal Maritime Law Conflict on the Standards Governing Liability

This case presents the ideal vehicle for finally resolving the question expressly left open by this Court in *Yamaha v. Calhoun*, the issue whether general maritime law or state law is the source of standards governing liability. 516 U.S. at p. 216.

The facts of the case directly and simply present the choice-of-law question on two claims for relief that are clearly the subject of differing standards governing liability under federal maritime law and California state law specifically strict product liability and

negligent infliction of emotional distress. There is no dispute in the case regarding the application of admiralty jurisdiction.

CONCLUSION

For the forgoing reasons, Bombardier respectfully requests that the Court grant this petition.

Respectfully submitted,

HAIGHT, BROWN &
BONESTEEL, L.L.P.
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Jules S. Zeman
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APPENDIX

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APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION ONE

B227857
(L.A.S.C. No. BC413322)
(CONRAD R. ARAGON, Judge)

[Filed December 16, 2010]

BOMBARDIER INC., BOMBARDIER RECREATIONAL PRODUCTS INC. AND BRP US INC.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

CARLOS ORLANDO FANDINO, etc., et al.,

Real Parties in Interest.

ORDER

THE COURT*:

The petition for writ of mandate, filed October 6, 2010; and the preliminary opposition thereto, filed October 15, 2010, have been read and considered.

The petition is denied.

/s/ Mallano	/s/Rothschild	/s/Johnson
*MALLANO, P. J.	ROTHSCHILD, J.	JOHNSON, J.

APPENDIX B

Court of Appeal, Second Appellate District,
Division One - No. B227857

IN THE SUPREME COURT OF CALIFORNIA

En Banc

S189332

[Filed February 16, 2011]

BOMBARDIER INC., BOMBARDIER RECREATIONAL PRODUCTS INC. AND BRP US INC.,

Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

CARLOS ORLANDO FANDINO, etc., et al.,

Real Parties in Interest.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX C

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 09/15/10					DEPT. 49
HONORABLE	CONRAD R. ARAGON	JUDGE	P. SOLIS		DEPUTY CLERK
HONORABLE		JUDGE PRO TEM			ELECTRONIC RECORDING MONITOR
M. LOMELI C.A.		Deputy Sheriff	NONE		Reporter

BC413322	Plaintiff Counsel
CARLOS ORLANDO FANDINO ET AL	(No appearances)
VS	Defendant
BOMBARDIER INC ET AL	Counsel

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTERS

On September 10, 2010, the Court heard argument on the following matters, and they were thereafter submitted for final decision, as follows:

1. Maritime Law Motion is denied. Defendants Bombardier, Inc., Bombardier Recreational Products, Inc. and BRP US, Inc., collectively, "Bombardier,"

move for an order applying admiralty law to the action commenced by plaintiffs Carlos Fandino, et al., collectively, "Fandino." In opposition, Fandino argues that admiralty law is wholly inapplicable because, e.g., the waters at issue are not "navigable," and or that there is no more than a "fanciful" risk to commercial shipping. These arguments are rejected.

The Court's denial of the motion rests on the "saving to suitors" clause (28 U.S.C. §1333). As the court understands the case law, where a plaintiff, as in this case, has both (in personam) maritime and common law claims, plaintiff may elect to proceed upon common law claims and forego the maritime claims. "[T]he saving-to-suitors clause preserves a plaintiff's right to a common law remedy in all cases where the common law is competent to give it. The common law is competent in cases proceeding in personam, but not those proceeding in rem. Accordingly, while federal courts have exclusive jurisdiction over in rem actions, federal and state courts have concurrent jurisdiction over in personam actions, and the effect of the clause is to give an in personam plaintiff the choice of proceeding in an ordinary civil action, rather than bringing a libel in admiralty." (In re Lockheed (4th Cir. 2007) 503 F.3d 351, 354; also, In re Chimenti (6th Cir. 1996) 79 F.3d 534, 537.)

"[P]laintiff with in personam maritime claims has three choices: He may file suit in federal court under the federal court's admiralty jurisdiction, in federal court under diversity jurisdiction if the parties are diverse and the amount in controversy is satisfied, or in state court. The difference between these choices is mostly procedural; of greatest significance is that there

is no right to jury trial if general admiralty jurisdiction is invoked, while it is preserved for claims based in diversity or brought in state court." (Ghotra v. Bandila (9th Cir. 1998) 113 F.3d 1050, 1054-1055.)

There is no question that Fandino's in personam products liability (and emotional distress) are claims that can be brought in state court. "In review of cases that address a concurrent jurisdiction of admiralty and civil action the proper focus is on whether the suit can be brought at 'common law,' that is, whether the court has an independent basis for jurisdiction and whether it is the type of claim that historically can be brought in state court or on the law side of the district court." (Ghotra, supra, 113 F. 3d at 1055.)

2. Dow Motion for Summary Judgment/Summary Adjudication is granted. Defendant Dow Chemical Canada, ULC ("Dow"), moves for summary judgment or summary adjudication upon the complaint of Carlos Fandino, et al. ("plaintiffs"). After the hearing on September 10, plaintiffs filed notice that they were withdrawing their opposition to the Dow motion, and the motion for summary judgment is therefore granted. Dow is to prepare the judgment upon summary judgment.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 9-15-10 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los

Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.
Date: 9-15-10
John A. Clarke, Executive Officer/Clerk

By: _____
P. Solis, Deputy

Adam Shea
Panish Shea & Boyle
11111 Santa Monica Blvd Suite 700
Los Angeles CA 90025

William Martin
Haight Brown Bonesteel
6080 Center Dr Suite 800
Los Angeles CA 90045-1574

Steven Park
Filice Brown Essa McLeod
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Los Angeles CA 90071

Anthony Ellrod
Manning & Marder
801 S Figueroa St 15th Floor
Los Angeles CA 90017-3012

MINUTES ENTERED
09/15/10
COUNTY CLERK

APPENDIX D

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 49
HON. CONRAD ARAGON, JUDGE

NO: BC413322

[Dated September 10, 2010]

CARLOS ORLANDO FANDINO, ET AL.,)
)
PLAINTIFFS,)
)
VS.)
)
BOMBARDIER, INC., ET AL.,)
)
DEFENDANTS.)
)

CERTIFIED COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION FOR AN ORDER

SEPTEMBER 10, 2010

APPEARANCES:

FOR PLAINTIFFS:

PANISH, SHEA & BOYLE
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BOMBARDIER:

HAIGHT, BROWN & BONESTEEL
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FOR DEFENDANT
JET WORLD:

MANNING & MARDER
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FOR DEFENDANT
DOW CHEMICAL CANADA:
(SPECIALLY APPEARING)

FILICE, BROWN, EASSA & MCLEOD
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42ND FLOOR
LOS ANGELES, CALIFORNIA 90071

LISA K. RAU, CSR NO. 10782
OFFICIAL REPORTER

[p.1]

CASE NUMBER:	**BC413322**
CASE NAME:	**FANDINO VS. BOMBARDIER**
LOS ANGELES, CALIFORNIA	**SEPTEMBER 10, 2010**
DEPARTMENT 49	**HON. CONRAD ARAGON, JUDGE**
APPEARANCES:	**(AS NOTED ON TITLE PAGE.)**
REPORTER:	**LISA K. RAU, CSR NO. 10782**
TIME:	**8:46 A.M.**

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: NUMBER SEVEN IS FANDINO VERSUS BOMBARDIER.

MR. ELLROD: GOOD MORNING, YOUR HONOR. ANTHONY ELLROD, E-L-L-R-O-D, ON

BEHALF OF DEFENDANT DAN FITZGERALD'S JET WORLD.

THE COURT: OKAY.

MR. B. MARTIN: GOOD MORNING, YOUR HONOR. BRYAN MARTIN NOR BOMBARDIER DEFENDANTS.

MR. W. MARTIN: GOOD MORNING, YOUR HONOR. SKIP MARTIN FROM HAIGHT, BROWN & BONESTEEL ALSO FOR THE BOMBARDIER DEFENDANTS.

MR. PARK: GOOD MORNING, YOUR HONOR. STEVEN PARK SPECIALLY APPEARING FOR DOW CHEMICAL CANADA, ULC.

MR. SHEA: GOOD MORNING, YOUR HONOR. ADAM SHEA APPEARING ON BEHALF OF PLAINTIFFS.

THE COURT: OKAY. I ADVANCED THE DOW CHEMICAL MSJ. IF THERE'S AN OBJECTION, YOU CAN COME BACK ON MONDAY, BUT

[p.2]

I'M HOPING WE CAN AVOID ANOTHER APPEARANCE ON THIS ONE. IS IT AGREED TO ARGUE TODAY?

MR. PARK: YOUR HONOR, I APOLOGIZE, BUT THE PERSON THAT WILL BE ARGUING THE MOTION --

THE COURT: ALL RIGHT. COME BACK MONDAY.

ALL RIGHT. WE'LL JUST TAKE UP THE ITEMS ONE AND TWO ON THE CALENDAR. AND SINCE I'M DENYING THE BOMBARDIER MOTION, I GUESS THAT'S MR. MARTIN, THAT'S YOUR MOTION?

MR. W. MARTIN: YES, YOUR HONOR.

MR. B. MARTIN: THIS IS MR. MARTIN.

THE COURT: OH, THAT'S MR. MARTIN.

MR. W. MARTIN: FIRST TEAM IS GOING TO ARGUE IT, YOUR HONOR.

MR. B. MARTIN: I DON'T KNOW ABOUT THAT.

THE COURT: OKAY. LET ME MAKE SURE I'VE GOT EVERYBODY IN LINE HERE. ALL RIGHT.

MR. MARTIN, GO AHEAD, SIR.

MR. B. MARTIN: YOUR HONOR, I READ THE TENTATIVE. IT LOOKS LIKE THE ISSUE RESOLVES AROUND THE SAVINGS TO SUITORS AND WHETHER IN STATE COURT THE STATE COURT CAN APPLY SUBSTANTIVE MARITIME LAW. AND, YOUR HONOR, I JUST WOULD LIKE TO QUICKLY HIT A FEW POINTS JUST TO MAKE THE RECORD.

THE COURT: OKAY.

MR. B. MARTIN: BUT ON PAGE 2 OF OUR MOVING PAPERS, THE JUDICIARY ACT OF 1789 ENDOWS FEDERAL COURTS WITH EXCLUSIVE ADMIRALTY JURISDICTION, BUT ALSO INCLUDES THE

[p.3]

SAVINGS OF SUITOR CLAUSE WHICH WAS IDENTIFIED IN THE TENTATIVE.

WHAT'S IMPORTANT ABOUT THAT IS THAT STATES COURTS DERIVE IN PERSONAM ADMIRALTY JURISDICTION, AND IT'S CONCURRENT JURISDICTION BETWEEN FEDERAL AND STATE COURT. SO STATE COURTS ARE COMPETENT TO ADJUDICATE MARITIME CAUSES OF ACTION.

ON PAGE 8 OF OUR MOVING PAPERS, YOUR HONOR, THERE'S A CASE BLEVENS VS. SFETKU, WHICH IS DIRECTLY ON POINT AND IT'S A CASE VERY SIMILAR TO OURS IN THIS CASE.

IN BLEVENS -- IT'S 259 CAL.APP.2D 527, PINPOINT 532. AND THERE THE PLAINTIFF WAS INJURED WHILE WATERSKIING BEHIND PARKER DAM ON THE COLORADO RIVER, WHICH IS PART OF LAKE HAVASU.

WHAT'S NOTABLE ABOUT THAT CASE IS THAT THE COURT OF APPEAL SPECIFICALLY STATED THAT A STATE COURT IS NOT FREE TO APPLY ITS OWN SUBSTANTIVE LAW TO A MARITIME CAUSE OF ACTION SIMPLY BECAUSE

THE STATE COURT HAS SUBJECT MATTER JURISDICTION.

WHAT'S NOTABLE IS, THE APPLICABLE LAW IS NOT DETERMINED BY THE CHOICE OF FORUM, IT'S DETERMINED BY THE NATURE OF THE ACTIVITY. WAS THIS A MARITIME CLAIM? YOU GO THROUGH THE MARITIME ANALYSIS IS. IS THERE NAVIGABLE WATERWAY? IS THE ACTIVITY ASSOCIATED WITH MARITIME ACTIVITY? AND THIRD, DOES IT HAVE A POTENTIAL --

THE COURT: I ANSWER "YES" TO ALL THOSE QUESTIONS.

MR. B. MARTIN: RIGHT. AND SO WHAT'S IMPORTANT IS THAT IF ADMIRALTY JURISDICTION EXISTS, IT DOESN'T MATTER

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WHAT THE FORUM IS, IT'S WHAT THE LAW -- THE SUBSTANTIVE LAW THAT APPLIES. AND THAT'S TO CREATE THE UNIFORMITY AMONGST –

THE COURT: I HAVE A QUESTION FOR YOU, MR. MARTIN. HOW COME YOU DIDN'T TELL ME WHAT THE SUBSTANTIVE PRODUCT LIABILITY OR EMOTIONAL DISTRESS LAW WAS UNDER FEDERAL LAW? AND WHY SHOULD I DEFER TO THE FEDERAL LAW IF IT'S EXACTLY THE SAME AS THE STATE SUBSTANTIVE LAW COMMON LAW ON PRODUCT LIABILITY AND EMOTIONAL DISTRESS?

MR. B. MARTIN: IT'S NOT THE SAME, YOUR HONOR.

THE COURT: WELL, WHERE IS IT IN YOUR PAPERS?

MR. B. MARTIN: IT'S IN OUR REPLY BRIEF, YOUR HONOR.

THE COURT: WELL --

MR. B. MARTIN: ACTUALLY, IT'S IN OUR MOVING PAPERS, AS WELL, YOUR HONOR.

THE COURT: I DON'T THINK SO. LET ME -- POINT ME IN THAT DIRECTION BECAUSE, IF THE SUBSTANTIVE LAW IS THE SAME, WHAT'S THE POINT?

MR. B. MARTIN: IT'S NOT -- THERE'S A DISTINCTION.

THE COURT: THE ONLY THING YOU ACHIEVE IS YOU DEPRIVE THE PLAINTIFF OF A TRIAL BY JURY.

MR. B. MARTIN: NO, YOUR HONOR. THERE'S A DISTINCTION BETWEEN THE SUBSTANTIVE LAW, MEANING THE REMEDY, VERSUS WHAT LAW WILL SUPPORT THAT REMEDY. ALL THE PLAINTIFF'S REMEDIES ARE RECOGNIZED IN ADMIRALTY: PRODUCTS LIABILITY, DESIGN DETECT, MANUFACTURING DEFECT, NEGLIGENT INFLICTION, BREACH OF CONTRACT.

THE QUESTION IS, WHAT LAW WILL BE APPLIED TO

[p.5]

SUPPORT THOSE REMEDIES? SO WHERE ALL THE REMEDIES DO EXIST IN ADMIRALTY LAW, UNDER THE ADMIRALTY JURISDICTION, THE LEGAL STANDARDS ARE DIFFERENT. SO THERE IS A CONFLICT. AND UNDER CALIFORNIA LAW, WE HAVE THE CONSUMER EXPECTATION, RISK BENEFIT.

THE COURT: WHERE IS THAT IN YOUR MOVING PAPERS?

MR. B. MARTIN: WELL, IT WAS -- YOUR HONOR, IT WAS RAISED IN OUR MOVING PAPERS THAT THE PLAINTIFFS HAVE THE REMEDIES IN ADMIRALTY JURISDICTION. PLAINTIFFS THEN RAISE IN THEIR OPPOSITION THAT THERE IS NO CONFLICT, IT'S MUCH ADO ABOUT NOTHING.

AND THEN WE SAID NO, THAT'S NOT TRUE, THERE IS A CONFLICT, AND IT'S A CONFLICT BETWEEN -- UNDER ADMIRALTY JURISDICTION THE LEGAL STANDARD FOR PRODUCTS LIABILITY IS UNDER RESTATEMENT 402(A), WHICH PLAINTIFFS HAS THE BURDEN --

THE COURT: YOU'RE DANCING A LITTLE BIT TOO LIGHTLY. THERE'S A LITTLE BIT TOO MUCH PRESTIDIGITATION GOING ON HERE. I WANT TO KNOW WHERE IN THE MOVING PAPERS YOU GIVE NOTICE THAT YOU ARE ARGUING THAT

THE SUBSTANTIVE LAW, AS DISTINCT FROM THE REMEDIES, ARE EITHER THE SAME OR DIFFERENT FROM THE SUBSTANTIVE LAW IN CALIFORNIA AND WHERE YOU MAKE A PRIMA FACIE SHOWING OF THAT.

IF YOU WAIT UNTIL THE REPLY TO AMBUSH YOUR OPPONENT ON A FUNDAMENTAL QUESTION SUCH AS THAT, I'M NOT SURE I WANT TO CONSIDER IT. BUT TELL ME WHERE IN THE MOTION PAPERS YOU TAKE UP THIS ISSUE OF THE DISTINCTIONS BETWEEN FEDERAL LAW -- IF THIS COURT IS REQUIRED TO ADOPT

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MARITIME OR ADMIRALTY LAW, HOW THAT DIFFERS FROM THE SUBSTANTIVE CALIFORNIA COMMON LAW. WHERE IS THAT?

MR. B. MARTIN: YOUR HONOR, I'M NOT SURE IF WE ADDRESSED THAT DIRECTLY. ON PAGE 9 AND 10 WE TALK ABOUT THE MARITIME PRINCIPLES AND THE MARITIME LAW, BUT THE STANDARD FOR MARITIME JURISDICTION TALKS ABOUT A THREE-PART TEST.

AND THAT IS, WERE THE WATERS NAVIGABLE? WHETHER THERE'S A RELATIONSHIP TO MARITIME ACTIVITY, AND WHETHER IT HAS THE POTENTIAL TO DISRUPT MARITIME ACTIVITY.

THE COURT: WELL, OKAY --

MR. B. MARTIN: THAT WAS THE STANDARD, AND THAT'S THE BASIS.

THE COURT: SO WHEN YOU GO THROUGH THAT CALCULUS, WHICH I DID, AND I ANSWER ALL THOSE QUESTIONS AFFIRMATIVELY, ALL THAT TELLS ME IS THAT THERE ARE TWO FORUMS THAT POTENTIALLY COULD EXERCISE SUBJECT MATTER JURISDICTION OVER THESE IN PERSONAM CLAIMS.

ALL THAT DOES IS GET ME TO RECOGNIZE THAT FEDERAL MARITIME LAW MAY WELL APPLY HERE BECAUSE I FOUND THOSE THREE TESTS TO BE SATISFIED, THAT THESE ARE NAVIGABLE WATERS AND THAT THERE'S MORE THAN A FANCIFUL IMPACT ON COMMERCIAL ACTIVITY IN A NAVIGABLE WATERWAY WHICH INVOLVES VESSELS.

BUT THEN WHEN I PASS THAT ANALYSIS, THE NEXT THING I ASK MYSELF IS, WELL, TWO QUESTIONS. FIRST IS, WHAT DOES THE LAW SAY ABOUT WHEN I HAVE A CHOICE, WHICH ONE DO I CHOOSE, AND DOES THE PLAINTIFF'S CHOICE HAVE ANY

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IMPACT ON MY DECISION? THE SECOND QUESTION I ASK IS WHETHER IF I APPLY FEDERAL LAW IT WOULD BE EXACTLY THE SAME AS CALIFORNIA SUBSTANTIVE LAW.

MR. B. MARTIN: YOUR HONOR, WE'RE DEALING WITH A DIFFERENT SITUATION. HERE, PLAINTIFFS CHOSE THE FORUM.

THE COURT: RIGHT.

MR. B. MARTIN: WE'RE IN STATE COURT. THE ISSUE IS, IS BASED ON ADMIRALTY ANALYSIS, DOES ADMIRALTY LAW PRESENT ITSELF AND MUST IT BE APPLIED IN THIS STATE COURT ACTION?

IT'S NOT -- THERE'S NO CHOICE OF LAW, YOUR HONOR. THERE COULD BE -- UNDER THE CASE LAW, THERE'S A CHOICE OF FORUM. PLAINTIFFS COULD HAVE ORIGINALLY BROUGHT THEIR CLAIMS IN FEDERAL COURT. THEY CHOSE TO, UNDER THE SAVINGS OF SUITOR CLAUSE, BRING IT IN STATE COURT.

BUT IRRESPECTIVE OF THE CHOICE OF FORUM, THE LAW IS THE SAME IN BOTH FORUMS, AND THAT IS THE PURPOSE OF OUR MOTION. JUST BECAUSE THEY'RE IN STATE COURT DOES NOT GIVE THEM THE RIGHT TO IGNORE ADMIRALTY JURISDICTION.

THAT WOULD DEFEAT THE WHOLE PURPOSE OF THE ADMIRALTY LAW STATUTES, THE WHOLE PURPOSE OF UNIFORMITY FOR THESE TYPES OF ACCIDENTS ON A NAVIGABLE WATERWAY. IF THIS ACCIDENT WERE TO OCCUR APPROXIMATELY 3 MILES IN A DIFFERENT DIRECTION, ARIZONA LAW WOULD ARGUABLY APPLY. THE WHOLE POINT OF

ADMIRALTY JURISDICTION IS TO KEEP UNIFORMITY.

AND SO HERE AGAIN, WITH THE SITUATION WHERE THEY CHOSE THE FORUM, BUT THAT DOES NOT MEAN, THOUGH, THAT THEY CAN CHOOSE THE LAW. THE LAW IS WHAT IT IS, AND

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THAT'S ADMIRALTY JURISDICTION, ADMIRALTY PRINCIPLES, ADMIRALTY LAW.

AND, YOUR HONOR, TO ANSWER YOUR QUESTION, THAT'S THE ONLY ANALYSIS REQUIRED UNDER WHETHER ADMIRALTY WILL APPLY IN A GIVEN CASE. THEY RAISE THE ISSUE THAT, HEY, THERE'S NO CONFLICT, SO WHY ARE THEY EVEN BRINGING THIS MOTION?

THE COURT: NO, THEY DON'T MAKE THAT -- THAT'S THE ARGUMENT YOU PRESSED ON ME. I THINK THAT THERE'S SUFFICIENT BASIS TO DENY THE MOTION SIMPLY ON THE AUTHORITIES THAT I CITED IN MY TENTATIVE, WHERE IT SAYS THAT IF THERE ARE TWO -- IF THE PLAINTIFF CAN CHOOSE TO PROCEED UNDER THE COMMON LAW, WHERE HE HAS AN OPTION OF EITHER CHOOSING MARITIME OR COMMON LAW, THAT'S -- THOSE ARE THE AUTHORITIES I READ.

WHAT'S WRONG WITH THOSE AUTHORITIES?

MR. B. MARTIN: BECAUSE THEY'RE IN DIRECT CONFLICT WITH BLEVENS VS. SFETKU. AND ALSO, YOUR HONOR, PAGE 6 OF OUR REPLY, THE CASE OF SCOTT VS. EASTERN AIRLINES, WHICH QUOTE, "AND ALTHOUGH THIS SUIT IS BROUGHT AS AN ACTION AT LAW, MARITIME PRINCIPLES WILL GOVERN THE TORT ASPECTS OF THE CASE SINCE ADMIRALTY STANDARDS DEFINE LIABILITY FOR A MARITIME TORT, WHETHER THE PROCEEDING IS INSTITUTED IN ADMIRALTY OR ON THE LAW SIDE OF THE COURT."

AND, YOUR HONOR, THE SCOTT CASE IS 399 F.2D 14 AT PINPOINT 25. NOW, I WOULD ASK THE COURT TO REVIEW THOSE CASES BECAUSE THEY'RE IN DIRECT CONFLICT WITH WHAT WE'RE SEEING IN THE TENTATIVE RULING.

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THE COURT: OKAY. I'LL DO THAT. LET ME CALL ON MR. SHEA TO RESPOND TO YOUR COMMENTS.

MR. SHEA: YOUR HONOR, OBVIOUSLY, I'M IN AGREEMENT WITH WHAT THE COURT HAS SAID WITH RESPECT TO, IN PARTICULAR, THIS WHOLE ISSUE THAT THEY RAISE FOR THE FIRST TIME IN THEIR REPLY BRIEF ABOUT CONFLICT OF LAW. OKAY?

THAT HAS A FUNDAMENTAL ISSUE HERE, AND WE DON'T SEE IT UNTIL THEIR REPLY BRIEF, WHERE THEY'VE RAISED IT, AND IT WASN'T SOMETHING THAT WE'VE GONE INTO

ANY DEPTH OF ADDRESSING WHETHER THERE'S A CONFLICT OF LAW.

I THINK THE COURT IS RIGHT ON THE WHOLE CHOICE OF FORUM, CHOICE OF LAW ISSUE. AND AT THE RISK OF SPEAKING TOO MUCH, I WANT TO BACKTRACK TO ONE THING BECAUSE I UNDERSTAND THE COURT'S -- THE COURT HAS VOICED THAT IT FEELS THAT A COUPLE OF THE FUNDAMENTAL QUESTIONS ARE ANSWERED IN THE AFFIRMATIVE, AND I WOULD JUST LIKE TO ADDRESS THAT BRIEFLY BECAUSE I THINK THAT WE DON'T EVEN GET TO THE POINT OF WHETHER WE HAVE A SUBSTANTIAL RELATIONSHIP OR CONNECTION TO MARITIME ACTIVITY.

I THINK THE CASES CITED, INCLUDING THE GRUBART CASE, WHICH IS A U.S. SUPREME COURT CASE, WHERE THAT'S THE CASE THAT TALKS ABOUT IS THIS A FANCIFUL ACTIVITY OR CONNECTION? AND I THINK IF YOU LOOK AT THE FACTS OF GRUBART VERSUS THE FACTS HERE, THEY ARE VERY DISTINGUISHABLE.

AND THE REASON I WOULD SAY THIS HAS A FANCIFUL CONNECTION TO A MARITIME ACTIVITY WOULD BE THIS.

THE COURT: NO, NO. DON'T EVEN WASTE YOUR BREATH

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BECAUSE THIS IS IN YOUR OPPOSING PAPERS. I KNOW YOUR ARGUMENT. ESSENTIALLY,

YOU'RE ASKING ME TO SAY THAT ONE OF THESE SPORTS VESSELS EXPLODING IN THE OPEN WATER WOULD NOT -- COULD NOT POTENTIALLY HAVE AN IMPACT ON COMMERCIAL ACTIVITY ON THE LAKE.

I THINK THAT'S AN ABSURD ARGUMENT, BUT YOU MADE IT, AND I THINK I UNDERSTAND IT. I DON'T KNOW HOW YOU CAN EMBELLISHMENT IT.

MR. SHEA: THAT'S FINE. I OWED IT TO BRING IT UP. BUT THE REST OF THE EXTENSION OF THE ANALYSIS DONE BY THE COURT, I THINK IT'S CORRECT, AND I THINK IT WILL REACH THE SAME CONCLUSION.

THE COURT: OKAY. MR. MARTIN, YOU GET THE LAST WORD AND THEN THE MATTER IS SUBMITTED. I AM GOING TO REREAD THESE CASES IN CHAMBERS AND SEE IF THE OUTCOME SHOULD BE DIFFERENT.

IS THERE SOME OTHER POINT YOU WANTED TO RAISE?

MR. B. MARTIN: I DON'T BELIEVE SO, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. SHEA: I WOULD JUST URGE THAT IF THE COURT IS LEANING TOWARDS CHANGING ITS TENTATIVE AFTER READING THE CASES, I THINK THAT FURTHER BRIEFING IS NECESSARY ON THIS ISSUE OF CONFLICT OF

LAW THAT FIRST WAS RAISED IN THE REPLY THAT WE DID NOT, YOU KNOW, HAVE ANY REASON TO ADDRESS IN ANY DEPTH BECAUSE IT HAD NEVER BEEN RAISED.

MR. B. MARTIN: I GUESS THE QUESTION I WOULD HAVE AT THAT POINT THEN IS THE ARGUMENT OR THE REQUEST TO ARGUE THAT FEDERAL AND STATE LAW IS IN FACT THE SAME OR THAT

[p.11]

THERE IS NO CONFLICT, OR WHETHER THERE'S A CONFLICT THAT DOES IN FACT EXIST.

THE COURT: OKAY. ALL RIGHT. LET ME JUST DRAW YOUR ATTENTION TO THE 3295 MOTION. I HAVE PROPOSED THAT -- FIRST OF ALL, I DON'T KNOW WHO PROVIDED THE REPORTER'S TRANSCRIPT, BUT THANK YOU. I READ IT AND IT'S CLEAR THAT THERE'S NOTHING -- THERE'S NO SPECIFIC MENTION.

SO CAN YOU GET ME THAT OPPOSING BRIEF BY SEPTEMBER 27, MR. MARTIN?

MR. B. MARTIN: SURE.

MR. W. MARTIN: YOUR HONOR, I DO HAVE A POINT I WOULD LIKE TO MAKE ON THAT.

THE COURT: OKAY.

MR. W. MARTIN: AT THE RISK OF INFORMATION OVERLOAD IN THIS CASE, THERE

WAS A DOCUMENT THAT WAS DISCLOSED AT A DEPOSITION IN JULY THAT WE CONTEND IS A PRIVILEGED DOCUMENT. IT'S AN INTERNAL MEMO FROM GENERAL COUNSEL AT BOMBARDIER TO UPPER MANAGEMENT.

WE MENTIONED THAT IN AN OCTOBER 1ST PLEADING WITH THE COURT, AND WE JUST FOUND OUT WITHIN THE LAST TWO WEEKS THE UNDERLYING FACTS AS TO HOW THAT WAS ULTIMATELY DISCLOSED IN CANADIAN LITIGATION.

I GOT THE LAST DOCUMENT YESTERDAY THAT WAS TRANSLATED. AND THAT MOTION TO HAVE THAT DOCUMENT RETURNED BECAUSE OF INADVERTENT DISCLOSURE SHOULD BE FILED TODAY.

NOW, THE REASON I BRING THAT UP IS BECAUSE SINCE AUGUST THE 1ST, THE PLAINTIFFS HAVE ATTACHED THAT

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DOCUMENT THAT WE CLAIM IS PRIVILEGED TO SEVERAL PLEADINGS WITH THE COURT, INCLUDING THE MOTION TO COMPEL FINANCIAL INFORMATION.

THE COURT: HAS THAT DOCUMENT, TO YOUR KNOWLEDGE, BEEN DISTRIBUTED TO THIRD PARTIES?

MR. W. MARTIN: IT WAS IN A COURT FILE -- I COULD GIVE THE ENTIRE HISTORY IF THE

COURT WANTS IT, BUT IT WAS IN A COURT FILE IN CANADA. PLAINTIFF'S COUNSEL OBTAINED IT. IT WAS USED AS A DEPOSITION EXHIBIT, AND IT WAS ALSO THEN USED TO ATTACH EXHIBITS TO THESE PLEADINGS. IT HAS NOT BEEN DISCLOSED TO ANY THIRD PARTIES OUTSIDE OF THE LITIGATION, TO OUR KNOWLEDGE.

THE COURT: WERE ANY STEPS TAKEN IN THE CANADIAN LITIGATION TO PROTECT THE DOCUMENT?

MR. W. MARTIN: YES, YOUR HONOR. THE FIRST THING THAT OCCURRED, THEY REALIZED A COUPLE OF YEARS AGO THAT THE DEFENDANT IN THAT CASE HAD THE DOCUMENT. THE PARTIES THERE DID VERY SIMILAR TO WHAT IS REQUIRED UNDER STATE COMP FUND IN THE UNITED STATES, AND THEY REACHED AN AGREEMENT IN THAT CASE THAT THERE WOULD BE AN OBJECTION TO THE PRODUCTION OF THE DOCUMENT AND THAT THE DOCUMENT WOULD NOT BE USED UNTIL THE COURT HAD RULED ON WHETHER OR NOT IT SHOULD BE RETURNED.

RECENTLY, WHEN THEY FOUND OUT THAT IT WAS IN THE COURT FILE, THERE WERE STEPS TAKEN TO --

THE COURT: YOU KNOW, I AM -- I THINK I'M VERY CAUTIOUS ABOUT DISSEMINATION OF WHAT ONE PARTY OR ANOTHER CLAIMS TO BE A PRIVILEGED DOCUMENT EVEN IF THERE HAS BEEN

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AN EARLIER PUBLICATION BECAUSE IT MIGHT HAVE BEEN AN INADVERTENT PUBLICATION.

I THINK THE SIMPLE REMEDY IS SIMPLY TO ORDER THE DOCUMENT EXPUNGED FROM EVERY PUBLIC FILING IN THIS CASE AND ALSO TO ACCORD IT A TEMPORARY PRIVILEGE STATUS UNTIL THE SUBJECT OF ITS PRIVILEGE OR CONFIDENTIAL NATURE IS RESOLVED.

MR. SHEA: BEFORE THAT HAPPENS, CAN I ADDRESS THAT BRIEFLY?

THE COURT: WELL, THIS IS WHAT I'M PROPOSING. SO THAT WHAT I'M TRYING TO DO IS AVOID A HEATED DISPUTE OVER WHETHER OR NOT THIS IS A PRIVILEGED DOCUMENT OR NOT. NEITHER SIDE, I THINK, IS DISADVANTAGED IF THE COURT ALLOWS THE DOCUMENT TO BE CONSIDERED IN CHAMBERS UNDER SEAL UNTIL THE ISSUE IS RESOLVED.

SO A SIMPLE STIPULATION BY THE PARTIES THAT THE COURT WILL REVIEW THAT PARTICULAR DOCUMENT -- THERE'S ONLY ONE DOCUMENT, ISN'T IT?

MR. W. MARTIN: YES. IT'S A THREE-PAGE DOCUMENT, YOUR HONOR.

THE COURT: THAT DOCUMENT IS REVIEWED IN CHAMBERS, YOU CAN USE IT FOR WHATEVER PURPOSE YOU WANT IN CONNECTION WITH ANY MOTION, BUT BEFORE IT ACTUALLY

BECOMES A MATTER OF PUBLIC RECORD, THE ISSUE WILL HAVE TO BE DETERMINED. AND, HOPEFULLY, IT WILL NEVER COME TO THAT BECAUSE THE DOCUMENT MAY NOT BE THAT IMPORTANT IN THE LONG RUN.

SO I WOULD PROPOSE YOU DO THAT, MR. SHEA, RATHER THAN TO SPEND A LOT OF TIME AND MONEY OPPOSING THE

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MOTION TO HAVE THE RECORD STRICKEN AND THE DOCUMENT SEALED.

MR. SHEA: THE ONLY PROBLEM I HAVE, YOUR HONOR, IS I THINK THAT MISREPRESENTATIONS WERE JUST MADE TO YOU --

THE COURT: WELL, NO --

MR. SHEA: -- ABOUT THIS DOCUMENT THAT --

THE COURT: I HEAR THIS ALL THE TIME, COUNSEL. COUNSELS SHOULDN'T -- I MEAN, DIFFERENT JUDGES REACT DIFFERENTLY TO THESE KIND OF THINGS. I DON'T PRESUME THAT YOU HAVE DONE ANYTHING NEFARIOUS OR WRONG IN OBTAINING THE DOCUMENT, AND THAT'S PRECISELY WHY I WANT TO HEAD THIS MOTION OFF AT THE PASS BECAUSE I DON'T WANT COUNSELS TO START ACCUSING ONE ANOTHER OF MISCONDUCT.

LET'S JUST TAKE A SIMPLE SOLUTION TO THIS APPROACH. I DON'T HOLD -- I DON'T HAVE ANY BIAS AGAINST YOU. I DON'T THINK YOU DID ANYTHING WRONG. I HAVEN'T MADE ANY FINDING, AND I'M HOPING I NEVER HAVE TO. WHAT I WANT TO DO IS JUST INSULATE THE DOCUMENT SO THAT WE CAN MAKE THIS DECISION, IF WE EVER HAVE TO, IN A MORE RATIONAL FASHION.

MR. W. MARTIN: WE'RE NOT ASKING FOR SANCTIONS OR ANYTHING IN THAT RESPECT.

MR. SHEA: YOU KNOW, THIS IS WHAT IS OUTRAGEOUS ABOUT THE WHOLE THING, IS THAT WE'RE TALKING ABOUT POTENTIAL NEFARIOUS CONDUCT OR POTENTIAL SANCTIONS.

THE COURT: NO, WE'RE NOT.

MR. W. MARTIN: I'M NOT, NO.

MR. SHEA: HOLD ON. YOU MADE A REPRESENTATION TO

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THE COURT --

THE COURT: GO AHEAD, MR. SHEA.

MR. SHEA: THIS DOCUMENT WAS FILED BY BOMBARDIER IN MONTREAL COURT. THE DOCUMENT HAS BEEN IN THE PUBLIC RECORD FOR SEVERAL YEARS, AND, IN FACT,

SUBSEQUENT FILINGS OF EXHIBIT LISTS BY BOMBARDIER, AND THE COURT REFERRED TO THAT DOCUMENT ON THE EXHIBIT LIST.

SO ANY SUGGESTION THAT POSSIBLY -- YOU'RE SAYING NO SANCTIONS -- HOLD ON -- THERE'S ALREADY THIS SUGGESTION THAT POSSIBLY WE POSSIBLY DID SOMETHING WRONG IS OUTRAGEOUS.

THE COURT: HOLD ON.

MR. W. MARTIN: I'M NOT SUGGESTING THAT, ADAM.

MR. SHEA: WE OBTAINED A COPY FROM THE COURT.

THE COURT: STOP. STOP. I DON'T WANT TO HEAR ANY MORE ON THIS SUBJECT.

WHAT YOU DON'T SEEM TO UNDERSTAND, MR. SHEA, IS IF THIS DOES GO TO A FULL ADJUDICATORY HEARING, I MAY DECIDE AND DETERMINE THAT YOU DID DO SOMETHING NEFARIOUS, AND WHAT I'M TRYING TO DO IS AVOID THIS. I'M NOT PRESUMING THAT ANYBODY HAS ACCUSED YOU OF ANYTHING, AND I DON'T HAVE ANY PREDISPOSITION TO BELIEVE THAT YOU DID.

MR. SHEA: I'M CONFIDENT WE DIDN'T.

THE COURT: WELL, GOOD. LET'S JUST INSULATE THIS DOCUMENT AND AVOID THE HEARING. IF THAT HEARING GOES ON

CALENDAR AND STAYS ON CALENDAR WITHOUT A RESOLUTION, THERE WILL BE AN ADJUDICATION ON THE MERITS. AND I THINK THAT WOULD BE UNFORTUNATE, BUT WE'LL SEE HOW COUNSELS ARE ABLE

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TO RESOLVE THIS.

WHAT I WOULD LIKE TO SEE FROM COUNSELS IS A STIPULATION THAT THE MATTER BE EXPUNGED AND KEPT IN A TEMPORARY SEAL UNTIL SUCH TIME AS THE ISSUE IS DETERMINED. AND I THINK WE'RE MAKING WAY TOO MUCH OUT OF WHAT IS PROBABLY JUST A VERY SIMPLE ISSUE AND A DOCUMENT THAT MAY HAVE VERY LITTLE EVIDENTIARY VALUE.

OKAY. SO THE 3295 MOTION YOU HAVE UNTIL SEPTEMBER 27. IS THAT ENOUGH TIME?

MR. W. MARTIN: IT'S ENOUGH TIME, YOUR HONOR. BUT, AGAIN, I WANT TO GO BACK TO THE TIMING ISSUE. THE DOCUMENT HAS BEEN RELIED UPON BY COUNSEL IN SUPPORT OF THAT MOTION. IF THE COURT WERE TO MAKE A RULING OR THERE WERE TO BE SOME RESOLUTION PRIOR TO THAT TIME, THEN THE DOCUMENT WOULD NOT BE CONSIDERED.

THE COURT: OKAY. WELL, I'M COUNTING ON MR. SHEA TO WORK WITH YOU. I THINK THE DOCUMENT SHOULD BE CONSIDERED, BUT IT SHOULD BE CONSIDERED TEMPORARILY

UNDER SEAL WITHOUT THE COURT MAKING A FINDING ONE WAY OR ANOTHER ON THE ISSUE.

SO LET'S SEE. THE OTHER MATTER IS I THINK I ASSUMED THAT YOU FOLKS WERE GOING TO CLEAR AVAILABILITY, AND YOU ASSUMED I WAS GOING TO CLEAR AVAILABILITY. SO I APOLOGIZE FOR THAT CONFUSION.

I'M CHECKING AVAILABILITY, AND BY MONDAY I'LL HAVE THE NAME OF THE NEW -- OF THE SUBSTITUTE NOMINEE FOR COUNSELS TO CONSIDER, BUT I'LL CHECK AVAILABILITIES FIRST.

MR. W. MARTIN: YOUR HONOR, I'M SORRY. AND MAYBE

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I'M JUST DENSE TODAY. WHEN THE COURT SAYS THE DOCUMENT SHOULD BE CONSIDERED UNDER SEAL, DOES THAT MEAN THE DOCUMENT SHOULD BE CONSIDERED UNDER SEAL AS A SUBSTANTIVE MATTER IN SUPPORT OF THE MOTIONS THAT THE PLAINTIFFS HAVE MADE, OR THAT THE DOCUMENT SHOULD BE EXAMINED UNDER SEAL TO DETERMINE WHETHER OR NOT IT CAN BE USED BY ANY PARTY IN THE LITIGATION?

THE COURT: NO, IT SHOULD BE EXAMINED IN CHAMBERS FOR WHATEVER VALUE THE PROPONENT OF THE DOCUMENT THINKS IT HAS.

MR. W. MARTIN: BUT THEN ISN'T THAT INCONSISTENT, AND IF THE COURT WERE TO DETERMINE THAT THE DOCUMENT SHOULD BE RETURNED AND NOT USED BY ANY PARTY, THAT THE COURT HAS ALREADY CONSIDERED IT.

THE COURT: NO, THERE'S ONLY TWO POSSIBILITIES HERE. ONE IS THAT IF IT EVER COMES TO THE COURT FOR THAT RESOLUTION, EITHER THE DOCUMENT WILL BE DETERMINED NOT TO BE CONFIDENTIAL AND PRIVILEGED AND THE TEMPORARY SEAL WILL BE REMOVED, OR IT WILL REMAIN PERMANENTLY SEALED.

BUT, IN THE MEANTIME, I WANT MR. SHEA TO HAVE FULL USE OF THAT DOCUMENT FOR WHATEVER PURPOSE MR. SHEA THINKS IS APPROPRIATE. SO THAT'S WHY IF THAT DOCUMENT IS PART OF HIS MOTION, I'M GOING TO REVIEW IT. BUT I'M GOING TO REVIEW IT IN CHAMBERS, AND I HOPE THAT COUNSELS WILL STIPULATE THAT I CAN PUT IT UNDER TEMPORARY SEAL.

MR. W. MARTIN: BUT, YOUR HONOR, THEN WHAT IF AFTER THAT THE COURT WERE TO DETERMINE THAT IT WAS AN INADVERTENT DISCLOSURE AND SHOULD BE RETURNED, BUT THE

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COURT THEN CONSIDERED THAT PREVIOUSLY IN RULING UPON THE MOTION?

THE COURT: YOU LOSE NOTHING BECAUSE IT WILL STAY PERMANENTLY UNDER SEAL, PERMANENTLY UNDER SEAL.

MR. W. MARTIN: BUT THE COURT WOULD HAVE CONSIDERED A DOCUMENT THAT WOULD NOT BE APPROPRIATE FOR THE COURT TO CONSIDER.

THE COURT: I DON'T KNOW ABOUT THAT. I THINK THAT'S THE SECOND PHASE OF A TWO-PHASE ANALYSIS. THE FIRST IS WHETHER IT'S PRIVILEGED OR NOT. THE SECOND IS WHETHER IT SHOULD NEVER HAVE BEEN IN THE HANDS OF A PROPONENT. AND, I DON'T KNOW. YOU MAY WANT TO FORCE THAT ISSUE. IT'S YOUR DECISION, BUT I'M HOPING IT WON'T COME TO THAT.

MR. W. MARTIN: I DON'T KNOW, YOUR HONOR. I FEEL LIKE I'M IN A SITUATION WHERE THE COURT COULD SAY THE DOCUMENT WAS INADVERTENTLY DISCLOSED AND SHOULD BE RETURNED, BUT, ON THE OTHER HAND, I CONSIDERED IT WITH RESPECT TO THE PLAINTIFF'S MOTIONS.

THE COURT: OKAY. WELL, YOU HAVE TO DO WHAT YOU HAVE TO DO THEN, COUNSEL, IS ALL I CAN TELL YOU.

ANYTHING ELSE? LET'S SEE. SO WHEN YOU COME BACK ON MONDAY YOU'RE GOING TO TAKE UP THE DOW MOTION?

MR. PARK: YES, YOUR HONOR.

MR. SHEA: YES, YOUR HONOR.

THE COURT: AND I'LL HAVE THE NAME OF THE SUBSTITUTE REFEREE. OKAY. IS NOTICE WAIVED? WELL, THE CLERK WILL GIVE NOTICE OF THE RULING BECAUSE I WANT TO REVIEW THIS TENTATIVE ONE MORE TIME IN CHAMBERS.

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OKAY. ANYTHING ELSE?

MR. ELLROD: YOUR HONOR, MAY I APPEAR BY COURTCALL ON MONDAY?

THE COURT: YOU DON'T HAVE ANY INTEREST IN THIS MOTION, DO YOU?

MR. ELLROD: ONLY INTELLECTUAL.

THE COURT: VERY WELL. COURTCALL IS FINE.

MR. ELLROD: THANK YOU.

MR. SHEA: DO YOU -- THE NAMES THAT HAVE BEEN SUBMITTED AS POTENTIAL REFEREES, DID YOU WANT US TO TOSS IN ANY MORE?

THE COURT: NO. I'M GOING TO DRAW FROM THOSE NAMES.

MR. SHEA: OKAY.

MR. ELLROD: WAIT, YOUR HONOR. THERE WAS ONE OTHER MATTER, IF I CAN BRIEFLY, JUST ON HOUSEKEEPING.

THE COURT: HOLD ON. WE'RE BACK ON THE RECORD. YES?

MR. ELLROD: WE'VE BEEN HOLDING ON TO MOTIONS TO COMPEL BOTH -- ALL PARTIES, I THINK, A NUMBER OF DISCOVERY MOTIONS PENDING APPOINTMENT OF THE REFEREE.

THE COURT: RIGHT.

MR. ELLROD: WITH THE TRIAL DATE WHERE IT IS, I JUST WANT TO MAKE SURE THAT WE'RE NOT -- NEED NOT BE CONCERNED WITH ANY LAW AND MOTION CUT-OFF THAT WOULD IMPACT THE FILING OF THOSE MOTIONS, JUST BECAUSE WE HAVE BEEN WAITING PURSUANT TO THE COURT'S ORDER TO FILE THOSE WITH THE REFEREE.

THE COURT: WELL, I DON'T THINK I CAN CUT OFF YOUR

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RIGHT TO HAVE THE MOTION HEARD. SINCE THE DELAY IS PARTLY ATTRIBUTABLE TO THE COURT, I CAN'T DO THAT. I'LL JUST HAVE TO FIND A TRIAL DATE THAT'S NOT TOO FAR AWAY FOR MR. SHEA TO GET HIS DAY IN COURT.

MR. ELLROD: AND I'M NOT ADDRESSING THE ISSUE OF THE TRIAL DATE RIGHT NOW. I JUST

WANT TO MAKE SURE WE'RE NOT COMPROMISED WITH RESPECT TO FILING THE MOTION.

THE COURT: IF I HAVE TO MAKE AN ADJUSTMENT, MR. SHEA, I'LL GIVE IT PRIORITY ON MY CALENDAR. EVEN IF I HAVE A FULL TRIAL LOAD, I'LL PUT YOUR CASE AS A PRIORITY CASE.

MR. SHEA: I JUST -- THIS IS COMING AS NEWS TO US, THEY'RE HOLDING OFF ON MOTIONS THAT -- YOU KNOW, WE'VE BEEN RAISING THIS FOR A WHILE NOW. THEY FILE SUMMARY JUDGMENT, WHICH WAS A BASIS FOR THE TRIAL DATE ORIGINALLY GETTING CONTINUED, AND THEN THEY PULL THEIR SUMMARY JUDGMENT OFF CALENDAR BECAUSE THEY REALIZE THEY HAD NO CHANCE.

AND, YOU KNOW, IT'S LIKE I DON'T KNOW ABOUT DISCOVERY MOTIONS THAT ARE BEING HELD. OUR CLIENTS, AS THE COURT IS AWARE, ARE VERY INTERESTED IN GETTING THIS TO TRIAL SOONER RATHER THAN LATER.

THE COURT: VERY WELL. THANKS, COUNSELS.

(PROCEEDINGS CONCLUDED.)

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 49
HON. CONRAD ARAGON, JUDGE

NO: BC413322

CARLOS ORLANDO FANDINO, ET AL.,	)
	)
PLAINTIFF(S),	)
	)
VS.	)
	)
BOMBARDIER, INC., ET AL.,	)
	)
DEFENDANT(S).	)
	)

REPORTER'S CERTIFICATE

I, LISA K. RAU, CSR NO. 10782, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS AND TESTIMONY TAKEN IN THE MATTER OF THE ABOVE-ENTITLED CAUSE ON SEPTEMBER 10, 2010.

DATED THIS 10 day of September, 2010.

/s/ Lisa K. Rau, CSR NO. 10782
LISA K. RAU, OFFICIAL REPORTER